

1 APPENDIX A  
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3 IN THE UNITED STATES CIRCUIT COURT OF  
4 APPEALS FOR THE NINTH CIRCUIT

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7 UNITED STATES OF AMERICA,

8 Petitioner,

9 vs.

10 HONORABLE PEIRSON M. HALL, Judge  
11 of the United States District  
12 Court for the Southern District  
of California,

No. 10,736

Nov. 25, 1944

13 Respondent.

14

15 Before: MATHEWS, STEPHENS and HEALY, Circuit Judges.  
16 STEPHENS, Circuit Judge.

17 The United States petitions this court for a writ of  
18 mandamus, directing the Honorable Peirson M. Hall, Judge  
19 of the United States District Court for the Southern  
20 District of California, to assume jurisdiction over the  
21 case of United States v. 1,960 Acres of Land in Riverside  
22 County, California, No. 2567-PH. For reasons which he  
23 regards as compelling Judge Hall refuses to take jurisdic-  
24 tion. This court issued its order to Judge Hall requiring  
25 him to show cause why the requested writ should not issue,  
26 and he has made his return. The facts herein related are

1 agreed to by the parties to this proceeding.

2 The matter in issue arises out of a Department of  
3 Justice policy adopted in the handling of the large number  
4 of land condemnation matters in which the United States is  
5 involved because of the present war. That department  
6 established an office in Los Angeles, California, separate  
7 and apart from the office of the United States District  
8 Attorney, staffed by attorney-officers of the Department  
9 of Justice, and supervised by a Special Assistant to the  
10 Attorney General. For a time after such establishment  
11 the United States District Attorney appeared as of record  
12 in litigation handled in such office.

13 In the fall of 1942, at the request of the Secretary  
14 of War, proceedings were brought on behalf of the United  
15 States to condemn 1,960 acres of land in Riverside County,  
16 California. The complaint was drafted by the Lands Division  
17 Office in Los Angeles and was signed "Leo V. Silverstein,  
18 United States (District) Attorney; Irl D. Brett, Special  
19 Assistant to the Attorney General (who had been specifical-  
20 ly authorized by letter from Assistant Attorney General  
21 Littell to institute the action); Sylvan G. Bay, Special  
22 Attorney, Lands Division, Department of Justice, By Sylvan  
23 G. Bay, Attorneys for Plaintiff." An order for immediate  
24 possession issued. Two tracts embraced in one of the  
25 declarations of taking, Tracts 21 and 22, were subject to  
26 California State and Riverside County tax claims, for

which an estimated compensation of \$20 was deposited in court.

In 1943, pursuant to a directive from the Attorney General, a more complete separation of the work of the Lands Division from that of the United States District Attorney's office in Los Angeles was effected. The District Attorney assented thereto upon the ground that the specialized work of the Lands Division could best be handled without his assistance. On September 1, 1943, the Lands Division ceased using the name of the United States District Attorney as counsel of record on pleadings in new suits, and since the tenth of that month the name of the United States District Attorney has not been used by the Lands Division in litigation both as to cases formerly filed in which the District Attorney appeared as attorney and as to new litigation. Subsequently, by a letter of October 19, 1943, addressed to Irl D. Brett, the Attorney General discussed the separation of Lands Division work from the United States District Attorney's office in Los Angeles and therein stated: " \* \* \* I have delegated to you, and I hereby specifically direct that you exercise, plenary authority to sign and file on behalf of the United States, any and all pleadings, briefs, papers or documents in the District Court in and for the Southern District of California which you may consider necessary or proper for the conduct of such Lands Division cases as have been, or may be in the

future, placed and maintained under your supervision by the Department of Justice. Other attorneys and Special Attorneys of the Department of Justice assigned to your office may also appear of record in such proceedings and cases and otherwise participate in the conduct thereof as you may authorize and direct." A copy of the Attorney General's letter and a letter of Brett, acting for and at the instance of the Attorney General, and appointing M. B. Zimmerman, a duly appointed, qualified and acting special attorney in the Lands Division of the Department of Justice, co-counsel in the Riverside County land proceeding were filed in the district court.

A stipulation for judgment in the land action referring to Tracts 21 and 22 was presented to the court by co-counsel Zimmerman. The written stipulation was signed by all the interested parties, and on behalf of the United States it was signed in the following forms:

"Irl D. Brett  
Special Assistant to  
The Attorney General  
M. B. Zimmerman  
Special Attorney  
Lands Division  
Department of Justice  
By Irl D. Brett  
Attorneys for Plaintiff"

1        The case was pending in the district court presided  
2        over by Judge Hall, and the latter declined to honor the  
3        stipulation and declined to sign the requested judgment on  
4        the ground that the district court was "without jurisdiction"  
5        because "the District Attorney must 'initiate and prosecute'  
6        condemnation proceedings on behalf of the Government" and  
7        that one who is "to assist the District Attorney" in such  
8        proceedings must be "'specially appointed' and 'specially  
9        directed' by the Attorney General in each case."

10       Mr. Brett himself then moved the district court to sign  
11       the stipulation. Again the court found a lack of jurisdiction  
12       of the matter "in view of the fact that counsel is  
13       regarded by the Court as not having the power to represent  
14       the United States Government." It should here be noted  
15       that at this juncture of the proceedings Judge Hall enter-  
16       tained the opinion that the stipulation must be signed by  
17       the District Attorney and also that an attorney or member  
18       of the Attorney General's staff had no standing in the case  
19       unless he had been specifically authorized to enter the  
20       specific case by the Attorney General.

21       Thereafter, Mr. Brett requested the Senior District  
22       Judge to reassign the case to another judge, but this re-  
23       quest was refused. A letter from the Attorney General,  
24       bearing a date subsequent to Judge Hall's first ruling on  
25       the stipulation for judgment, specially appointing Mr. Brett  
26       and Mr. Zimmerman as attorneys to handle case No. 2567-PH

1 on behalf of the United States, was filed, and a motion was  
2 again made by Mr. Brett requesting Judge Hall to assume  
3 jurisdiction. The motion was denied on the grounds set  
4 forth in Judge Hall's original opinion that formal matters  
5 in the litigation must bear the authentication of the United  
6 States District Attorney as an attorney in the case.

7 After alleging the history of the case in the petition  
8 for the writ of mandamus, it is stated that Judge Hall's  
9 action interferes with the Attorney General's opinion as to  
0 the best manner of handling and disposing of condemnation  
1 matters arising in the Southern District of California.  
2 The petition concludes: "WHEREFORE, Your petitioner prays  
3 that this Court issue a writ of mandamus compelling the  
4 Honorable Peirson M. Hall, Judge of the United States  
5 District Court for the Southern District of California,  
6 (1) to recognize the authority of the Attorney General to  
7 assign to Mr. Irl D. Brett and/or members of his staff,  
8 independently of the United States Attorney's office, condem-  
9 nation matters arising in the Southern District of Califor-  
0 nia, and more particularly the proceeding entitled United  
1 States v. 1,960 Acres of Land in Riverside County, Califor-  
2 nia, No. 2567-PH; (2) to recognize the authority of Mr. Irl  
3 D. Brett and/or his assistants to represent the United  
4 States in such proceedings; and (3) to accept and assume  
5 jurisdiction over all pleadings and motions which Mr. Irl D.  
6 Brett and/or his assistants may file on behalf of the United

1 Judge Hall's court."

2 The questions presented herein are whether Judge Hall  
3 erred in finding lack of authority to represent the United  
4 States on the part of the government attorneys and whether,  
5 if he did so err, this court should direct him to accept  
6 jurisdiction in the premises through the issuance of our  
7 writ of mandamus.

8 Petitioner's prayer for the issuance of a writ is broad,  
9 requesting as it does that Judge Hall be directed to recog-  
10 nize the authority of the Attorney General to assign condem-  
11 nation matters to Irl D. Brett and staff, to recognize the  
12 authority of Mr. Brett and his assistants to represent the  
13 United States in such proceedings, and to assume jurisdiction  
14 over all pleadings and motions filed by Mr. Brett and his staff  
15 on behalf of the United States in condemnation proceedings.

16 Our power to issue the writ prayed for is derived from  
17 and is limited by Judicial Code, Section 262 (28 USCA § 377).  
18 We quote the section, emphasizing the part thereof which  
19 prescribes and limits the basis of our jurisdiction and  
20 which shows that we have no jurisdiction to issue the writ  
21 except in aid of our appellate jurisdiction. "§ 377. (Judi-  
22 cial Code, section 262.) Power to issue writs. The Supreme  
23 Court and the district courts shall have power to issue  
24 writs of scire facias. The Supreme Court, the circuit  
25 courts of appeals, and the district courts shall have power  
26 to issue all writs not specifically provided for by statute,

1      which may be necessary for the exercise of their respective  
2      jurisdictions, and agreeable to the usages and principles  
3      of law. \* \* \*.\*

4      A federal appellate court may by writ of mandamus compel  
5      an inferior court to take action in a case when the inferior  
6      court has a duty to do so and where the exercise of such  
7      power is necessary to protect the higher court's appellate  
8      jurisdiction. 28 USCA § 377; *Ex parte United States*, 237  
9      US 241 (1932); *Ex parte Simons*, 247 US 231 (1918);  
10     *McClelland v. Garland*, 217 US 268 (1910); *In re Grossmayer*,  
11     177 US 48 (1899); *Ex parte Schollenberger*, 96 US 369 (1877).  
12     We hold that we have no power to consider the petition in  
13     the broad and general nature of the prayer but that we have  
14     such power to the extent that the petition applies to the  
15     specific case out of which Judge Hall's rulings arose.

16     A district attorney has authority to condemn land re-  
17     quested, as in the instant case, by the Secretary of War  
18     for an air base since under 40 USCA § 256 legal services  
19     leading to the procurement of titles to public building  
20     sites, with certain exceptions not pertinent hereto, are to  
21     be rendered by United States district attorneys. The pro-  
22     ceeding in question, therefore, was one which a district  
23     attorney had the authority to conduct. We shall presently  
24     see by quoting § 310 of Title 5 USCA that the measure of  
25     the district attorney's authority in litigation is made the  
26     measure of the Attorney General's authority and that there-

1 fore the instant proceeding falls within the latter  
2 official's authorization. The legal right of duly ap-  
3 pointed deputies or assistants of the Attorney General to  
4 act when directed to do so by authority of the Attorney  
5 General presents no difficulty.

6 The thesis that the Attorney General can act in a legal  
7 proceeding cognizable by the district attorney only in con-  
8 junction with the district attorney or that an assistant or  
9 deputy Attorney General can act in such a case only where  
10 he is specifically authorized in each proceeding, as we  
11 see it, cannot be maintained.

12 In support of our conclusion as above expressed we  
13 refer to § 485 of Title 28 USCA and § 310 of Title 5 USCA.  
14 Section 485 provides in part: "It shall be the duty of  
15 every district attorney to prosecute, in his district, all  
16 delinquents for crimes and offenses cognizable under the  
17 authority of the United States, and all civil actions in  
18 which the United States are concerned \* \* \*." Section 310  
19 of Title 5 USCA provides: "The Attorney General or any  
20 officer of the Department of Justice, \* \* \* may, when  
21 thereunto specifically directed by the Attorney General,  
22 conduct any kind of legal proceeding, civil or criminal,  
23 including grand jury proceedings and proceedings before  
24 committing magistrates, which district attorneys may be by  
25 law authorized to conduct, whether or not he or they be  
26 residents of the district in which such proceeding is

brought." It will be seen, as is so well expressed in Sutherland v. International Ins. Co. of N. Y., 43 Fed. 2d 969, 970 (CCA 2, 1930); that "This (power theretofore confined to the District Attorney) was enlarged in 1906 (title 5 U. S. Code § 310 (5 USCA § 310)), to include the Attorney General," or "'any officer of the Department of Justice,'

\* \* \*."

The Sutherland case further stated at page 970 that: " \* \* \* The Attorney General has powers of 'general superintendence and direction' over district attorneys (title 5, U. S. Code, § 317 (5 USCA § 317)), and may directly intervene to 'conduct and argue any case in any court of the United States' \* \* \*. Thus he may displace district attorneys in their own suits, dismiss or compromise them, institute those which they decline to press.<sup>1</sup> No such system is capable of operation unless his powers are exclusive, \* \* \*. His power must be coextensive with his duties. \* \* \*."

The following quotation from the opinion in Booth v. Fletcher, 101 Fed. 2d 676 (App. D. C., 1938), certiorari denied, further shows the views entertained in the matter

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<sup>1</sup> No importance should be given to the limitation seen in the phrase "institute those which they decline to press" for the reason that the case under consideration did not raise the issue beyond the terms of the expression.

1 by the Judges of the Second Circuit. At page 634: \* \* \*  
2 Moreover, even under the circumstances of the Throckmorton  
3 Case the court there indicated that the law would have been  
4 satisfied if the record had revealed that 'some one  
5 authorized to use his name' had appeared in behalf of the  
6 Attorney General, or if, 'without special regard to form,  
7 but in some way which the court can recognize' an appearance  
8 on behalf of the Attorney General had been made, or if in  
9 the argument of the case such an officer had appeared and  
10 participated.\* See also Shushan v. United States, 117 Fed.  
11 2d 110, 114 (CCA 5, 1941); United States v. Amazon  
12 Industrial Chemical Corporation, 55 Fed. 2d 254 (D.C. Md.,  
13 1931), and for comment on liberal construction, see United  
14 States v. Sheffield Farms Co., 43 Fed. Supp. 1, 3 (D.C.N.Y.,  
15 1942).

16 It seems to us and we hold that § 310 of Title 5 USCA  
17 authorizes the Attorney General to institute litigation, to  
18 enter into pending litigation, and to cooperate with the  
19 district attorney or to proceed to handle such litigation  
20 independent of the district attorney, and any officer of  
21 the Department of Justice may act in the same manner and to  
22 the same extent providing he is authorized so to do by the  
23 Attorney General. Judge Hall is of the opinion that such  
24 authorization must be from the Attorney General or direct  
25 to each officer of the Department of Justice who is to  
26 enter the litigation and must be directed specifically to

each case he is to enter. We are of the opinion and so hold that the authorization may be direct to each designated officer of the Department or it may be to an officer in immediate supervision over several other such officers and may include such authorization to any or all of the several. And we are further of the opinion and we so hold that such authorization need not be directed to specifically designated cases but may be designated and limited descriptively as was done in the instant case by the Attorney General when he authorized Mr. Brett and the attorneys under his immediate direction to act in the kind of cases, to-wit, such land cases as from time to time shall be assigned to the Los Angeles Lands Division office.

It further appears that this court would have appellate jurisdiction as to any judgment that may be entered in said case and that this court has authority to issue its writ of mandamus in aid of such appellate jurisdiction. We conclude that our legal discretion should be exercised in favor of the issuance of such writ, and we therefore direct the issuance of the writ of mandamus in accordance with the principles and limitations mentioned in this opinion.

In his "Response to Order to Show Cause" the learned district judge denies what he terms "the insinuations contained in said Petition \* \* \* and in the argument attached to said Petition, to the effect that his failure to act

1 in said matter has been due to arbitrary unwillingness on  
2 his part, \* \* \*. We have carefully reexamined the petition  
3 and the attached argument, and we can find no insinuations  
4 of arbitrary unwillingness in either instrument. In fact  
5 any remote suggestion of anything of the kind must instantly  
6 be dismissed as the memorandum of opinion prepared and  
7 filed by the judge in support of his rulings demonstrate  
8 a high degree of industry and earnest desire to prevent  
9 complications so often the consequence of error.

10 Let the writ issue in accordance herewith.

11 (Endorsed:) Opinion. Filed Nov. 25, 1944. Paul P.  
12 O'Brien, Clerk.

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